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No. 90-578

In the Supreme Court of the United States

OCTOBER TERM, 1990

ALTA VERDE INDUSTRIES, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Food Security Act of 1985, 7 U.S.C. 1446(d)(3), requires the United States to compensate beef producers for losses incurred as a consequence of the Department of Agriculture's implementation of the Act.

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OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a-2a) is noted at 907 F.2d 158. The opinion of the Claims Court (Pet. App. 3a-18a) is reported at 18 Cl. Ct. 595.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1990. A petition for rehearing was denied on July 6, 1990. Pet. App. 20a-21a. The petition for a writ of certiorari was filed on October 4, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. As part of the Food Security Act of 1985, 7 U.S.C. 1446(d)(3), Congress established the Dairy Termination Program (DTP) as a means of reducing over-production of milk and reducing federal dairy subsidies. H.R. Rep. No. 271, 99th Cong., 1st Sess. 20-21, 205-207 (1985). Under the program, dairy farmers could contract with the Department of Agriculture (USDA) to dispose of their dairy cattle and to suspend production of milk for five years in exchange for incentive payments from the USDA and the retention of proceeds from the sale of their cattle. Recognizing that the program would increase the supply of beef on the market—and thereby reduce prices for producers of meat—Congress directed the Secretary in the DTP to take "all feasible steps" to minimize adverse effects on beef, pork, and poultry producers resulting from the program, 7 U.S.C. 1446(d)(3)(C), and to specify by regulation certain prescribed marketing procedures for the dairy cattle slaughtered pursuant to the program. 7 U.S.C. 1446(d)(3)(A)(iii)(II).[1]

On March 28, 1986, the USDA announced its regulations to implement the program. Thereafter, beef prices dropped significantly, and the market for beef remained unstable for months. Pet. App. 6a.

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[1] Congress also provided, in order "[t]o minimize the adverse effect of the milk production termination program on beef, pork, and lamb producers in the United States," that the Secretary of Agriculture purchase 400 million pounds of red meat in addition to quantities normally purchased and distributed by the Secretary; that the Secretary of Defense and other federal agencies increase the use of red meat to satisfy the needs of food programs; and that the Secretary encourage the public to eat red meat. 7 U.S.C. 1446 note, at 671-672.

2. Petitioners, 26 ranchers who sold beef in the months following the announcement of USDA's regulations, filed a complaint in the United States Claims Court seeking money damages pursuant to the Tucker Act, 28 U.S.C. 1491(a)(1). Petitioners alleged that "inadequacies in the USDA regulations precipitated [a] panic which drove down meat prices," causing them to lose profits. Pet. App. 6a. Petitioners further alleged that the Food Security Act created an "implied mandate" that beef producers be compensated for the injuries they experienced from the USDA's improper administration of the statute. *Id.* at 8a-9a.

The Claims Court dismissed petitioners' claims for lack of jurisdiction under the Tucker Act. The court explained that "[t]he Tucker Act does not supply an independent basis for monetary relief"; instead, "plaintiffs must invoke a substantive right to receive monetary compensation from the Government in some independent source of federal law." Pet. App. 10a. In making that showing, the court continued, plaintiffs must establish "that the independent law 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' " *Ibid.*, quoting *United States* v. *Testan*, 424 U.S. 392, 400 (1976).

Here, the court noted, the Food Security Act of 1985 "did not expressly mandate monetary compensation for beef producers in the event that USDA failed to obey the law." Pet. App. 10a. Conceding that an express damages provision was absent, petitioners urged that "Congress implicitly mandated money damages." *Ibid.* But the court rejected petitioners' effort to imply a damages remedy where none was provided expressly. The court noted that the

Food Security Act's legislative history disclosed "no Congressional intent to create a damages remedy," *id.* at 11a, and that no decision of this Court or of the Claims Court supported the inference that petitioners were entitled to damages because of the Secretary's alleged violation of the requirements of the statute. *Id.* at 12a-14a. The court concluded:

> This case does not fall within the narrow circumstances in which money-mandating provisions have been implied in the past. Congress must specifically mandate monetary compensation. Because there is no explicit language by Congress indicating its consent to suit by injured beef producers, and because the legislative history is void of such an intent, this court lacks subject matter jurisdiction over this claim.

Id. at 14a.[2]

3. The Federal Circuit affirmed, per curiam, without opinion. Pet. App. 1a-2a.

ARGUMENT

The conclusion of both courts below that the Food Security Act of 1985 does not mandate the payment of compensation to petitioners is correct and consistent with well-established principles governing the government's liability under the Tucker Act. There is no conflict with any decision of this Court or of any other court of appeals. Moreover, because the

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[2] Petitioners also urged that the Claims Court had Tucker Act jurisdiction to grant relief based upon the Takings Clause of the Fifth Amendment, and upon an "unjust enrichment" theory. Pet. App. 8a. The Claims Court rejected those theories for recovery as well, *id.* at 15a-18a, as did the Federal Circuit in affirming the judgment, *id.* at 1a-2a. Petitioners do not press those claims in this Court. Pet. 5-6.

Food Security Act created a limited-duration program that has now expired, the issue petitioners present has no continuing significance.

1. Petitioners contend (Pet. 12-21) that they are entitled to compensation under the Tucker Act for damages they suffered as a consequence of the Secretary of Agriculture's allegedly improper implementation of the Food Security Act. It is a cardinal principle of Tucker Act jurisprudence that "the Tucker Act 'does not create any substantive right enforceable against the United States for money damages.'" *United States* v. *Mitchell*, 463 U.S. 206, 216 (1983). Rather, "[a] substantive right must be found in some other source of law, such as 'the Constitution, or any Act of Congress, or any regulation of an executive department.'" *Ibid.* In considering a claim for payment under the Tucker Act, the crucial issue is whether "the source of substantive law can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *Id.* at 218.

Petitioners readily concede that the Food Security Act contains no explicit authorization for their claim to compensation for alleged lost profits. Pet. 13 ("Admittedly, the petitioners here cannot point to language in the Food Security Act that expressly grants beef producers the right to sue the United States if the USDA ignores its statutory duties under the Act."). Moreover, petitioners acknowledge a complete lack of support in the legislative history for their present claim to financial redress from the government. *Ibid.* Those concessions are not only well advised, but also dispositive of their contention that Congress intended to establish an insurance scheme for the beef industry when it au-

thorized the Secretary of Agriculture to administer a program designed to "reduce federal dairy price support payments." Pet. App. 4a. As the Claims Court correctly concluded after canvassing the language, purposes, and legislative history of the Food Security Act of 1985, there is simply no evidence that Congress "even contemplated compensating beef producers for lost profits." Pet. App. 11a.[3]

2. Petitioners nevertheless rely (Pet. 14-21) on a potpourri of theories to support an "implied" right to compensation for their losses resulting from the operation of the Act. None of those claims, which read into the statute a remedy that Congress failed to provide, has merit.

a. Petitioners first seek (Pet. 14-15) to draw an analogy between the statutes found to give rise to an implied right to compensation in *United States* v. *Mitchell*, *supra*, and the Food Security Act of 1985. *Mitchell*, however, affords no comfort for petitioners.

In *Mitchell*, the Court considered a network of timber-management statutes and regulations governing land held in trust for Indians, which, collectively, gave the government "full responsibility to manage Indian resources and land for the benefit of the Indians * * * thereby establish[ing] a fiduciary rela-

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[3] Congress gave explicit attention to the potential impact of liquidating herds of dairy cattle on the market for beef, and provided the remedies it saw fit. Not only did Congress give instructions to the Secretary about how to administer the program to avoid undue market disruption, 7 U.S.C. 1446(d)(3)(A)(iii), it also provided for substantially increased governmental purchasing of red meat and commanded the Secretary to "encourage the consumption of red meat by the public." 7 U.S.C. 1446 note, at 671-672. The absence of any provision manifesting an intention to compensate the beef industry financially is conspicuous.

tionship and defin[ing] the contours of the United States' fiduciary responsibilities." 463 U.S. at 224. The fiduciary relationship flowed from the language of the pertinent provisions; the assumption by the government of pervasive control over the property of Indians; and "the undisputed existence of a general trust relationship between the United States and the Indian people." *Id.* at 224-225. The Court concluded that the fiduciary obligations created in that setting "can fairly be interpreted as mandating compensation" if the government breached its trust obligations toward Indians by mismanaging timber resources on their land. *Id.* at 226.

It is difficult to imagine a statutory context more removed from *Mitchell*'s than is the Food Security Act. Nothing in the language of that Act remotely suggests that the United States assumed fiduciary responsibilities towards that beef industry; the Act does not require the government to manage property owned by petitioners; and petitioners do not even claim that there is any historic basis for inferring the existence of a fiduciary relationship towards cattle ranchers. Congress's direction to the Secretary of Agriculture to ameliorate the anticipated market effects of liquidating dairy cattle simply reflects regulatory policy in economic matters; it does not convert the government into a trustee for the Nation's beef producers.

b. Petitioners further attempt (Pet. 15-16) to predicate a claim to compensation on their allegations that the government stood to benefit from mismanaging the DTP program, and that the economic gain the government derived came at the expense of beef producers. From this premise, they contend that they have a claim based upon *Eastport Steamship Corp.* v.

United States, 372 F.2d 1002, 1008 (Ct. Cl. 1967), which noted that a right to compensation exists "to recover an illegal exaction" of money where "the Government has the citizen's money in its pocket."

That theory does not apply here; it applies only to those situations "in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum." 372 F.2d at 1007. Such a claim is considered to be derived from a statute because the government had exacted the money "based upon a power supposedly conferred" by the statute. *Id.* at 1008. Petitioners, however, do not allege that the USDA exacted any money from them. Rather, petitioners' claim, at bottom, is simply a reformulation of the "unjust enrichment" theory that petitioners unsuccessfully urged in the courts below, see Pet. App. 17a-18a, and elected not to press in this Court. Pet. 5.

c. Petitioners next rely (Pet. 16-18) on *Grav* v. *United States*, 886 F.2d 1305 (Fed. Cir. 1989), to support their claim that the Secretary's alleged violation of law in a regulatory program gives rise to a right of compensation in their behalf. In *Grav*, a milk producer had sold his dairy cattle for slaughter and had submitted an application for payment to the Secretary under the Milk Diversion Program, a predecessor to the DTP. When the Secretary denied payment, the producer brought a Tucker Act claim. The Federal Circuit found that Tucker Act jurisdiction existed, but for reasons that are wholly inapplicable here. The court concluded that the applicable statute, 7 U.S.C. 1446(d)(3)(A) (Supp. I 1983), was a "money mandating statute" because it left the Secretary of Agriculture with no discretion to refuse to enter into contracts with any applicant who was

qualified to participate in the program. 886 F.2d at 1307. Whatever the merits of the court's interpretation of that provision, petitioners are not similarly situated. There is nothing in the Food Security Act that obligated the Secretary to enter into contracts with petitioners.[4]

Indeed, this case is more analogous to *Yancey* v. *United States*, 915 F.2d 1534 (1990), in which the Federal Circuit rejected a claim that a turkey grower was entitled to compensation from the United States because he suffered a loss in selling his healthy turkey breeder stock as a result of a quarantine imposed by the USDA. The court explained that "Congress' failure to explicitly create a right of compensation for healthy animals" defeated the grower's claim under the Tucker Act. *Id.* at 1539.

Petitioners understate the breadth of their own theory in asserting (Pet. 17) that it would have only the modest consequence of affording compensation for injured beef producers, without "open[ing] the door" to a myriad of other claims. Even as applied to the Food Security Act, that is not correct. Congress intended the USDA to minimize the adverse effects of the DTP not only for beef producers, but also for pork and lamb producers. 7 U.S.C. 1446 note, at 671-672. If petitioners' Tucker Act claim were upheld, those producers would doubtless file their own claims for compensation; others in the meat industry

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[4] Contrary to petitioners' insistence (Pet. 17), the requirements imposed on the Secretary to cushion the impact of the program on beef producers did not require the payment of money to petitioners, nor was the congressional direction to the Secretary to purchase 400 million pounds of red meat a "money mandating" feature of the statute in the sense used by *Grav*.

who were adversely affected by the sudden drop in beef prices would also be encouraged to press their own claims. The cumulative implied damages could be staggering.

More generally, petitioners' theory cannot easily be limited to the Food Security Act. Many statutes establishing economic programs implicitly or explicitly require government agencies to take care that industries affected by their actions do not suffer undue business losses. But it is inevitable, in the regulation of a complex economy, that such schemes will occasionally be implemented without fully satisfying all program objectives. If industries affected by those regulatory actions could predicate a right to damages from the government on as slender a basis as is proffered by petitioners, it "would necessarily * * * open the doors to similar claims by other [regulated parties] who suffer commercial damage" from the administration of a government program. *Eastport*, 372 F.2d at 1009. Any such dramatic expansion of liability should come from Congress, not from judicially implied damages remedies based on the purported misconduct of Executive Branch officials. Cf. *Office of Personnel Management* v. *Richmond*, 110 S. Ct. 2465 (1990).

d. Petitioners' final argument (Pet. 19-20) is that they are entitled to seek compensation because Congress required the Secretary to carry out the DTP program through the Commodity Credit Corporation (CCC), which is a "sue and be sued" agency. That argument has two flaws. First, petitioners did not sue the CCC under its "sue and be sued" clause, which affords jurisdiction only in district court, see 15 U.S.C. 714b(c); rather, their claim seeks compensation from the *United States* in the Claims Court.

Second, even if the United States could be "sued" as if it were the CCC, that exposure, by itself, does not provide a source of law that entitles petitioners to monetary compensation from the government; there still must be an independent basis for liability. Cf. *Loeffler* v. *Frank*, 486 U.S. 549, 554-556 (1988). Here, there is none.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Petitioners' discussion (Pet. 20-21) of whether injunctive relief was available under the Food Security Act is beside the point. Although the Claims Court stated that "Congress provided beef producers with prospective protections, rather than a retroactive monetary damages remedy," Pet. App. 11a, that reasoning is not essential to the conclusion that petitioners have not established a source of substantive law entitling them to money damages. The only issue presented here is whether 7 U.S.C. 1446 is a "money mandating" statute for purposes of Tucker Act jurisdiction. Whether that provision created enforceable rights in an injunctive context was not an issue before the Claims Court, and is not an issue before this Court.

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